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In The

Supreme Court of the United States

October Term, 1959

No. 212

Mass Communicators, Inc.,
Petitioner

v.

Federal Communications Commission,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Seymour M. Chase
Wyatt Building
Washington 5, D. C.
Attorney for Petitioner

Wilson - Epes Printing Co. - RE 7-6002 - Washington 1, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

MASS COMMUNICATORS, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mass Communicators, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 16, 1959 (Appendix A, *infra*).

Opinions Below

The memorandum opinion and order of the Federal Communications Commission is reported unofficially at 17 Pike & Fischer R.R. 572 and is reprinted as part of the record herein (R. 148). The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported, but is reprinted as Appendix B, *infra*.

Jurisdiction

The subject judgment of the Court of Appeals was entered on April 16, 1959 (Appendix A, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 47 U.S.C. 402(j).

Questions Presented

Where a broadcasting station construction permit is granted by the Federal Communications Commission and subsequently expires, where a new applicant then files an application for a construction permit for the same facilities, and where the former permittee thereafter files an application for a construction permit to replace the expired permit:

1. Does the Commission have the power to grant the former permittee a new permit in place of the expired permit when the Commission cannot make the finding specified in the applicable statute, viz., that completion of the construction within the time prescribed was prevented by causes not under the control of the grantee?

2. May the Commission summarily return the new application and grant the replacement application or is it required to hold a comparative hearing to determine which of the two mutually exclusive applications should be granted?

3. Where the Commission has before it serious unresolved questions bearing upon the qualifications of the applicant, may it grant an application for a construction permit to replace an expired permit while holding those questions for consideration and disposition in a proceeding to be conducted later?

Statutes and Regulations Involved

The statutory provisions involved are contained within Sections 308, 309, and 319 of the Communications Act of

1934, as amended by Communications Act Amendments, 1952, approved July 16, 1952, c. 879, 66 Stat. 714, 715, 718, 47 U.S.C. 308, 309, 319, and a further amendment approved March 26, 1954, c. 111, 68 Stat. 35, 47 U.S.C. 319(b). The pertinent regulations are Federal Communications Commission Rules and Regulations, Sections 1.313, 1.314, 1.322, all at 47 C.F.R. 35, Section 1.323, at 47 C.F.R. 36, and Section 1.361, at 47 C.F.R. 47. The aforesaid statutory provisions and regulations are set forth in Appendix C, *infra*.

Statement of the Case

The Federal Communications Commission is authorized by statute to grant a construction permit for a broadcasting station if it can find that the applicant is qualified and that the public interest, convenience and necessity would be served thereby.[1] Upon completion of the authorized construction the permittee may apply for and the Commission may grant a regular license for the operation of the station.[2] Regarding the original construction permit, however, the Congress provided:

> "Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee."[3]

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[1] Communications Act of 1934, as amended, Sections 308, 309, 319(a) (Appendix C, *infra*, p. 1)

[2] Communications Act of 1934, as amended, Section 319(c) (Appendix C, *infra*, p. 1).

[3] Communications Act of 1934, as amended, Section 319(b) (Appendix C, *infra*, p. 1).

On March 20, 1957 the Commission granted an application of one Jane A. Roberts on a Form 301[4] for a construction permit for a new standard broadcast station at Cedar Falls, Iowa (R. 1-4). The permit specified November 20, 1957 as the date for the completion of the construction. By the specified date, Mrs. Roberts had not completed the construction, nor had she availed herself of the opportunity to file an application on Form 701[5] for additional time to complete construction. Accordingly, the permit expired by its terms on November 20, 1957. Twenty-three days later, on December 13, 1957, this petitioner filed an application on Form 301 for a construction permit for a new standard broadcast station, proposing identical facilities. Ten days thereafter, on December 23, 1957, Mrs. Roberts filed an application on Form 321 for a construction permit to replace the expired permit (R. 7). On January 3, 1958, the petitioner brought to the Commission's attention a number of facts giving rise to questions as to the qualifications of Mrs. Roberts (R. 11-20). That these were serious questions is not disputed.

On January 17, 1958, the Commission acted on the two applications before it. It granted the Form 321 application of Mrs. Roberts (R. 23), thereby awarding her a construction permit to replace the expired permit,[6] and

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[4] Federal Communications Commission Rules and Regulations, Section 1.322(a)(1) (Appendix C, *infra*, p. 2).

[5] Federal Communications Commission Rules and Regulations, Section 1.323(a) (Appendix C, *infra*, p. 2).

[6] The Commission subsequently sought to resolve the pending qualifications questions by ordering a hearing on the later application of Mrs. Roberts for a license to cover the construction permit. A Commission Hearing Examiner has since issued an Initial Decision looking toward a denial of that license application (and, *a fortiori*, revocation of the construction permit) in light of determinations made under issues growing out of those questions. FCC 59D-55, released May 28, 1959, Docket No. 12597. This petitioner hastens to acknowledge that the instant petition

it summarily returned the Form 301 application of the petitioner (R. 155-A). The petitioner thereupon filed with the Commission a petition for reconsideration, again tendering its Form 301 application (R. 107-124). The Commission denied the petition for reconsideration and again returned the petitioner's application (R. 148-154, 157). On this occasion the Commission expressly acknowledged that there was no basis for a finding that completion of the authorized construction within the time prescribed was prevented by causes not under the control of Mrs. Roberts (R. 152). There followed an appeal to the United States Court of Appeals for the District of Columbia Circuit.

On April 16, 1959, a panel of the Court of Appeals, by a 2-1 division, affirmed the Commission (Appendix B, *infra*).

Reasons for Granting the Writ

I.

Section 319(b) of the Communications Act (Appendix C, *infra*, p. 1) has been federal law since its provisions were first enacted as part of the Radio Act of 1927 (approved February 23, 1957, c. 169, Sec. 21, 44 Stat. 1170, U.S.C., Title 47, Sec. 101). Its scope is as wide as the title within which it is now contained ("Title III—Provisions Relating to Radio") for it applies, with limited exceptions, to every construction permit which the Commission grants for a new radio transmitting station or for changes in the facilities of an existing station. Such grants number in the tens of thousands every year, and they concern radio facilities in every part of the nation. Although its scope and applicability have

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for a writ of certiorari would be rendered moot if the said license application is ultimately and finally denied and the construction permit is revoked. Should these events occur the petitioner will inform the Court promptly.

that much importance, the language of the statute is not entirely clear, the meaning of its words and phrases is not perfectly plain, as is indicated by the controversy engendered herein and by the division of opinion among the Judges of the Court of Appeals. This case presents the first opportunity for scrutiny of Section 319(b) by the courts, and for a judicial determination of the meaning and the effect of the root of the statute, the provision for automatic forfeiture of construction permits which have been allowed to expire. The petitioner asserts, therefore, that there are here presented questions of fundamental importance to the administration of the Communications Act which have not been, but should be, settled by this Court.

Petitioner also asserts that the statute ought not to be left with the construction given it by the Court below because the reasonableness of that construction is patently questionable, and because that construction would lead to some confusion.

Petitioner contends that the statute simply provides that a construction permit which has been allowed to expire is automatically forfeited as of the expiration date,[7] and that the Commission has no power to prevent or to undo the forfeiture unless it can find that completion of construction before the expiration date was prevented by causes beyond the control of the permitee. The Court below held to the contrary in the following words:

> "It is clear that an expiration of a permit was by no means to be considered an automatic forfeiture of the permit. Only if the Commission did not exercise its discretion in extending the time within which the facilities were to be constructed, either by an actual extension . . . or by a grant of a new permit

[7] See Federal Communications Commission Rules and Regulations, Sections 1.313 and 1.314 (Appendix C, *infra*, p. 2).

to replace the expired permit . . . was there to be an automatic forfeiture.

"Since no automatic forfeiture occurs unless and until the Commission has exercised its discretion . . ." (Appendix B, *infra*, p. 6).

Petitioner asserts that this reasoning is questionable on its face. Can there be reason or logic in a holding that the Commission has *discretion* to prevent an *automatic* forfeiture? Is it proper to equate an extension of an outstanding unexpired permit with a grant of a new permit to replace an expired permit? What is most significant, may the Court below endow the Commission with the power to prevent a forfeiture in every circumstance (except outright abandonment) notwithstanding that the statute makes clear the intent of Congress that there should be at least some circumstances in which a permit would be forfeited "automatically", i.e., beyond the power of anyone to prevent it?

The construction given to Section 319(b) by the Court below will lead to confusion in that the applicant seeking replacement of an expired permit will not know what standard it is expected to meet. Must it show that the expiration occurred by virtue of causes beyond its control, as the statute specifices, or will some lesser showing be sufficient? The Court below appears to hold that either the statutory standard or a lesser one may be applied (Appendix B, *infra*, pp. 3-4), but is it reasonable to suppose that the Congress purposefully imposed the higher standard, then, in the same stroke, authorized the Commission to apply a lower standard in its discretion? Even if so, how is one to know when the higher standard is applicable, and when a lesser one?

II.

Assuming, *arguendo*, that it was within the Commission's power under Section 319(b) to grant the Form 321 application of Mrs. Roberts (for a new construction

permit to replace the expired permit), the question is then presented whether the Court below has permitted an exercise of that power in contravention of the doctrine established by the landmark decision of this Court in the *Ashbacker* case,[8] and in derogation of the right to a hearing which accrued to this petitioner under that doctrine. In *Ashbacker* the Court held that, having two mutually exclusive applications before it, the Commission is required to hold a comparative hearing before it is free to grant either of them. The Commission has acted accordingly from that time forward,[9] but held that it was not obliged to do so in this case. The applicability of the *Ashbacker* doctrine to the mutually exclusive applications of the petitioner and Mrs. Roberts—is another important question of federal law which should be settled by this Court.

III.

The Commission is authorized to grant construction permits only if it can reach the determination that the public interest, convenience and necessity would be served thereby.[10] An integral element in that determination is a finding that the applicant is qualified in various specified respects.[11] It is not disputed that all such findings are indispensable prerequisites to a grant. In *Easton Publishing Co.* v. *Federal Communications Commission*, 87 U.S. App. D.C. 344, 185 F.2d 987, the Court below made reference to:

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[8] Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327.

[9] See Federal Communications Commission Rules and Regulations, Section 1.361 (Appendix C, *infra*, p. 3).

[10] Communications Act of 1934, as amended, Sections 308, 309 (Appendix C, *infra*, p. 1).

[11] Communications Act of 1934, as amended, Section 319(a) (Appendix C, *infra*, p. 1).

". . . the Commission's duty to award applications for construction permits in satisfaction of public convenience, interest or necessity *at the time of the award.*" *Id.* at 348, 185 F.2d at 991 (Emphasis added).

Petitioner believes the instant case involves the first occasion on which the Commission has presumed to grant any form of application for a construction permit without first disposing of pending questions bearing upon the qualifications of the applicant. The Court below has sanctioned this action, but without adequate explanation (Appendix B, *infra*, pp. 7-8). So novel and radical a departure from a fundamental requirement of the Communications Act ought not to be sanctioned without review by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SEYMOUR M. CHASE
Wyatt Building
Washington 5, D. C.
Attorney for Petitioner

July 10, 1959.

APPENDIX A

Filed Apr. 16, 1959, JOSEPH W. STEWART, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1958

No. 14,630

MASS COMMUNICATORS, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE,
JANE A. ROBERTS, Permittee of Radio Station KCFI,
Cedar Falls, Iowa, INTERVENOR.

On Appeal from the Federal Communications Commission

Before WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the Federal Communications Commission on appeal in this case are affirmed.

Per Circuit Judge WASHINGTON.

Dated: Apr. 16, 1959.

Circuit Judge WILBUR K. MILLER dissents.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,630

MASS COMMUNICATORS, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE,
JANE A. ROBERTS, Permittee of Radio Station KCFI, Cedar Falls, Iowa, INTERVENOR.

On Appeal from the Federal Communications Commission

Decided April 16, 1959

Mr. Seymour M. Chase for appellant.

Mr. Richard M. Zwolinski, Counsel, Federal Communications Commission, with whom *Messrs. John L. Fitzgerald* General Counsel, Federal Communications Commission, and *Richard A. Solomon*, Assistant General Counsel, Federal Communications Commission at the time the brief was filed, were on the brief, for appellee. *Mr. Mark E. Fields*, Counsel, Federal Communications Commission, also entered an appearance for appellee.

Mr. Harry J. Daly, with whom *Mrs. Lenore G. Ehrig* was on the brief, for intervenor.

Before WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge*: The issue in the present case is whether the Federal Communications Commission is required under the doctrine of *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945), to hold a comparative hearing as between the applications made to it by appellant on the one hand and the intervenor (Mrs. Jane A. Roberts) on the other. The facts may be briefly stated.

On March 20, 1957, the Commission granted the application of Mrs. Roberts for a construction permit for a new standard broadcast station at Cedar Falls, Iowa. The permit specified November 20, 1957, as the date for the completion of construction. By the specified date, Mrs. Roberts had not completed the construction, nor had she filed an application on Form 701 for additional time to complete construction. See Communications Act of 1934, § 319(b), 48 Stat. 1089, as amended, 47 U.S.C. § 319 (b) (Supp. V, 1958); 47 C.F.R. § 1.323(a) (1958). Accordingly, the permit expired by its terms on November 20, 1957. Twenty-three days later, on December 13, 1957, the appellant, Mass Communicators, Inc., filed an application on Form 301 for a construction permit for a new standard station, proposing the same facilities. See Communications Act of 1934, §§ 308-09, 48 Stat. 1084-85, as amended, 47 U.S.C. §§ 308-09 (1952, Supp. V, 1958); 47 C.F.R. § 1.322(a)(4) (1958). Ten days thereafter, on December 23, 1957, Mrs. Roberts filed an application on Form 321 for a construction permit to replace the expired permit. See Section 319(b) of the Act; 47 C.F.R. § 1.323 (b) (1958).

The Commission found that although Mrs. Roberts had not been prevented from completing construction by causes outside of her control, she nevertheless had displayed a degree of due diligence in carrying on the construction, and that in fact the work had been substantially completed by November 20, 1957. The Commission therefore granted her Form 321 application and,

without hearing, returned the appellant's Form 301 application, stating in essence that it had exercised its discretion to replace Mrs. Roberts' expired construction permit, even though she had filed her Form 321 application more than thirty days after the expiration date. See *ibid.*

The appellant thereupon filed with the Commission a petition for reconsideration of its actions, again tendering its Form 301 application. In the petition, the appellant averred that, according to the terms of Section 319 (b) of the Act, there had been an automatic forfeiture of the intervenor's construction permit on the date of its expiration, and that therefore the Commission had before it two conflicting and mutually exclusive applications, one pursuant to Sections 308-309, and the other pursuant to Section 319(b) of the Act. Appellant took the position that the Commission was obliged under the *Ashbacker* doctrine to hold a comparative hearing on the two applications. The Commission denied the petition for reconsideration and returned the appellant's application. This appeal followed.

Section 319(b) of the Communications Act provides:

> "(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee."

The permit is thus required to provide for automatic forfeiture "if the station is not ready for operation within the time specified," subject, however, to two important avenues by which forfeiture may be avoided. If the Commission finds that the construction of the station facilities had not been completed by the specified time because

of "causes not under the control of the grantee," the Commission cannot declare an automatic forfeiture of the permit. Cf. *Richmond Development Corp.* v. *Federal Radio Commission*, 59 App.D.C. 113, 35 F.2d 883 (1929) (holding under Section 21 of the Radio Act of 1927, ch. 169, 44 Stat., pt. 2, at 1171, the counterpart of present Section 319(b)). If, on the other hand, the causes for delay of construction are within the control of the grantee, the Commission is given the power to exercise its discretion and allow further time for construction. An automatic forfeiture of the permit then occurs only "if the station is not ready for operation . . . within such further time as the Commission may allow . . . ."

While over the years the Commission has established varying procedures for the consideration of requests for granting further time for construction, its course of decision seems to us to have been consistent with the statutory plan. Prior to 1947, the Commission's regulations only provided for a Form 701 application for the extension of time within which a station could be constructed. FCC Rules and Regulations § 3.215(b), 10 FED.REG. 2006 (1945) [now 47 C.F.R. § 1.323(a) (1958)]. Under the regulation, the application had to be filed "at least 30 days prior to the expiration date of [the construction] permit." Applications were also accepted if filed within less than thirty days prior to the expiration date upon a showing satisfactory to the Commission of sufficient reasons for late filing. In both circumstances, the Commission granted the extension "upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension."

In 1947, the problem arose as to what discretionary power the Commission had when a Form 701 application was filed after the expiration date of the original construction permit. The Commission held that even in this situation no automatic forfeiture takes place unless and

until the Commission refuses to exercise its discretion to allow additional time for construction. *Bremer Broadcasting Corp.*, 3 PIKE & FISCHER R.R. 1579 (1947) (hereinafter cited as R.R.). As the Commission stated:

> "Clearly, the statute confers on the Commission the discretionary power to allow additional time for construction. Moreover, the statute contains no requirement that this power be exercised by the Commission only upon application filed prior to the completion date specified in the permit." *Id.* at 1582.

The Commission thus made plain its view that although the regulations specified that applications for renewal be filed either thirty days prior to the expiration date or at least within the thirty-day period prior to the expiration date, such specification did not exhaust the statutory grant of power in Section 319(b) of the Act.

Ten days after the *Bremer* decision, the Commission promulgated a new regulation concerning expired construction permits. Once a permit had expired, the applicant was now required to make an application on FCC Form 321 for a new construction permit to replace the expired permit. Rules and Regulations § 1.314(c), 12 FED.REG. 7080 (1947) [now 47 C.F.R. § 1.323(b) (1958)]. The new procedure would now make impossible a filing on Form 701 after the original permit had expired, as was done in *Bremer*, but clearly the new regulation was not intended to change or renounce the statutory power of the Commission in exercising its discretion. As was stated in *Christian County Broadcasting Co.*, 6 R.R. 849, 850 n. 2 (1950):

> "The fact that the request of Christian County . . . was filed on Form 321, 'Application for Construction Permit to Replace Expired Permit,' whereas in the Bremer case the request was made on Form 701, 'Application for Additional Time to Construct Radio Station,' is immaterial, since both seek additional time in which to complete construction." Accord, *WJAB, Inc.*, 13 R.R. 461 (1956).

Thus, the new regulation presumably was to make explicit what the statute itself already allowed. It is clear then that an expiration of a permit was by no means to be considered an automatic forfeiture of the permit. Only if the Commission did not exercise its discretion in extending the time within which the facilities were to be constructed, either by an actual extension under Section 1.314(b) of the regulations (Form 701), or by a grant of a new permit to replace the expired permit under Section 1.314 (c) (Form 321), was there to be an automatic forfeiture.

Since no automatic forfeiture occurs unless and until the Commission has exercised its discretion, the *Ashbacker* doctrine has never been applied to a Section 319 (b) application. Thus a Form 301 application for a construction permit has never been allowed a comparative hearing with a Form 701 application for an extension of time to complete construction when the Form 701 application was filed prior to the expiration date of the old permit. See, *e.g.*, *United Detroit Theatres Corp.* v. *Federal Communications Commission*, 85 U.S.App.D.C. 238, 178 F.2d 700 (1949); *New England Theatres, Inc.*, 4 R.R. 1194 (1949); *Lacy-Potter Television Broadcasting Co.*, 4 R.R. 893 (1948); *Don Lee Broadcasting System*, 4 R.R. 100 (1948). Similarly no comparative hearing has been allowed when the Form 701 application was filed after the expiration date of the original permit. See *Bremer Broadcasting Corp., supra*. Nor has a comparative hearing been allowed when a Form 321 application was filed for a replacement permit. See *WJAB, Inc. supra*; *Christian County Broadcasting Co., supra*. Presumably the rationale behind all these decisions is that the two applications presented cannot be considered to be "mutually exclusive" applications for "an available frequency," see *Ashbacker Radio Corp.* v. *Federal Communications Commission, supra*, 326 U.S. at 333, for the frequencies in effect are not "available" in the *Ashbacker* sense; nor

can they become "available" until there occurs an actual forfeiture, either by an abandonment of the permit by the original permittee or by an adverse—and valid—administrative action by the Federal Communications Commission.

In the present case, there is an added difficulty. The regulation now in force requires that a Form 321 application be filed "within 30 days of the expiration date of the authorization sought to be replaced." 47 C.F.R. § 1.323(b) (1958). The intervenor in the case at bar filed her Form 321 application thirty-three days after the expiration of the original permit. Nevertheless, the Commission satisfied itself that there had been sufficient extenuating circumstances so as to allow it to grant additional time. Its action here is comparable to the Commission's action in the *Bremer* case in which a Form 301 application was allowed to be filed after the expiration date. Here, as there, the regulations require that the discretionary power of the Commission be exercised upon the application filed only prior to the date or time period specified. But the regulations cannot be read to limit the statutory grant of power under Section 319(b). One of the major purposes of the section is to allow the Commission to exercise its discretion before an automatic forfeiture takes place. Under the circumstances of the present case, where the Commission's discretion has been exercised to prevent a forfeiture, there can be no basis for applying the *Ashbacker* doctrine.

Appellant also contends that because it raised questions as to the intervenor's fitness to operate the station, the Commission should have considered and resolved those questions in a hearing prior to the granting of intervenor's application for a construction permit on Form 321. Instead, the Commission granted the latter application and postponed the questions raised concerning intervenor's fitness until the holding of a hearing—which the Commission ordered—on intervenor's application for

license to operate. We do not think this exceeded the Commission's powers, or abused its discretion. Compare Section 319(c) with Section 319(b); see also Section 312. We do not reach the other contentions of the parties.

The orders of the Commission will accordingly be

Affirmed.

WILBUR K. MILLER, *Circuit Judge*, dissents.

APPENDIX C

Statutes and Regulations Involved

1. Communications Act of 1934, as amended

"§ 308. (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it . . .

"(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station . . ." (Communications Act Amendments, 1952, approved July 16, 1952, c. 879, Section 6, 66 Stat. 714, 47 U.S.C. 308).

"§ 309. (a) If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application." (Communications Act Amendments, 1952, approved July 16, 1952, c. 879, Section 7, 66 Stat. 715, 47 U.S.C. 309).

"§ 319. (a) No license shall be issued under the authority of this chapter for the operation of any station . . . unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station . . .

"(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

"(c) Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met . . . the Commission shall issue a license to the lawful holder of said permit for the operation of said station . . ." (Communications Act Amendments, 1952, approved July 16, 1952, c. 879, Section 13, 66 Stat. 718, 47 U.S.C. 319, and a further amendment approved March 26, 1954, c. 111, 68 Stat. 35, 47 U.S.C. 319(b)).

2. Federal Communications Commission, Rules and Regulations

"§ 1.313 *Forfeiture of construction permit.*—A construction permit shall be automatically forfeited if the station is not ready for operation within the time specified therein or within such further time as the Commission may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the Commission as of the expiration date." (47 C.F.R. 35, 1 Pike & Fischer R.R. 51:196).

"§ 1.314 *Period of Construction.*—Each construction permit will specify a maximum of 60 days from the date of granting thereof as the time within which construction of the station shall begin and a maximum of 6 months thereafter as the time within which construction shall be completed and the station ready for operation, unless otherwise determined by the Commission upon proper showing in any particular case." (47 C.F.R. 35, 1 Pike & Fischer R.R. 51:196).

"§ 1.322 *Application forms for authority to construct a new station . . .* —(a) Applications for new facilities . . . shall be made on the following forms:

(1) FCC Form 301 'Application for Authority to Construct a New Broadcast Station or Make Changes in an Existing Broadcast Station'." (47 C.F.R. 35, 1 Pike & Fischer R.R. 51:197).

"§ 1.323 *Application for extension of construction permit or for construction permit to replace expired construction permit.*—(a) Application for extension of time within which to construct a station shall be filed on FCC Form 701. The application shall be filed at least 30 days prior to the expiration date of the construction permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases, an application will be accepted upon a showing satisfactory to the Commission of sufficient reasons for filing within less than 30 days prior to the expiration date. Such applications will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension.

"(b) Application to replace an expired construction permit shall be made on FCC Form 321 'Application for Construction Permit to Replace Expired Permit'. Such application must be filed within 30 days of the expiration date of the authorization sought to be replaced." (47 C.F.R. 36, 1 Pike & Fischer R.R. 51:197, 198).

"§ 1.361 *Grants without hearing of authorizations other than licenses pursuant to construction permit* . . . —(a) An application for an instrument of authorization, other than a license pursuant to a construction permit, will be granted without hearing where: . . . (2) there is not pending a mutually exclusive application . . ." (47 C.F.R. 47, 1 Pike & Fischer R.R. 51:251).

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 212

MASS COMMUNICATORS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B 1–8) is not yet reported. The orders of the Federal Communications Commission (R. 25, 67–68) have not been reported, and its decision denying reconsideration (R. 58–66) is unofficially reported at 17 Pike & Fischer, Radio Regulation 572.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1959 (Pet. App. A). The petition for a writ of certiorari was filed on July 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

The Federal Communications Commission reinstated a construction permit for a new radio station which had inadvertently been allowed to expire prior to completion of construction, though a new application to use the frequency in the community had been filed in the interim and questions as to the permittee's qualifications to be a broadcast licensee had been raised. The questions presented are:

1. Whether the Commission had authority to reinstate the permit where completion of construction within the time originally prescribed was not prevented by causes not under the control of the permittee.

2. Whether the Commission could properly refuse to give the new application comparative consideration with the application to replace the expired permit.

3. Whether the Commission could properly grant the replacement application while holding the questions relating to the permittee's qualifications in abeyance for subsequent consideration in a hearing ordered upon permittee's application for a license.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) are set forth in Appendix C to the petition. Section 319(c) of that Act, 47 U.S.C. 319(c), which is partially quoted in Appendix C, reads as follows:

> Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon if being

made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. * * *

STATEMENT

This case concerns an appeal from Federal Communications Commission actions granting an application by a permittee of a standard broadcast station to reinstate an expired construction permit, and returning, without hearing, petitioner's application for the same facilities on the ground that the frequency sought was not "available" for assignment. The relevant facts are as follows:

On March 20, 1957, the Commission granted the application of Mrs. Jane A. Roberts for a construction permit for a new standard broadcast station at Cedar Falls, Iowa (R. 1–4). The construction permit specified November 20, 1957, as the date for completion of construction (R 2). By the specified date, Mrs. Roberts had not quite completed the construction, nor had she filed an application on FCC Form 701 for additional time to complete construction, as provided by Section 319(b) of the Communications Act and Section 1.323(a) of the Commission Rules. As a consequence, Mrs. Roberts' construction permit

expired in accordance with its terms on November 20, 1957.[1]

On December 13, 1957, the petitioner, pursuant to Section 308 of the Communications Act, submitted an application for a construction permit for a new standard broadcast station requesting the same facilities authorized to Mrs. Roberts (R. 59). On December 23, 1957, four days after being advised by the Commission that her permit had expired, Mrs. Roberts filed an application on FCC Form 321 for a construction permit to replace her expired permit (R. 10–13). The petitioner, on January 3, 1958, filed a letter with the Commission which raised, *inter alia,* questions as to Mrs. Roberts' qualifications to be a licensee (R. 16–23).

On January 17, 1958, the Commission found that, although Mrs. Roberts had not been prevented from completing construction by causes beyond her control, she nevertheless displayed reasonable diligence in carrying on the construction, and that construction of her station had, in fact, been substantially completed by November 20, 1957, the date specified by the Commis-

[1] Mrs. Roberts had secured a modification of her permit on July 5, 1957, to change transmitter type and studio and transmitter location (R. 9). Contrary to her belief, however, the modified permit did not extend the original period for construction, but instead specified the original date, by reference (R. 10). The Commission was also originally unaware that Mrs. Roberts' permit had expired, and consequently, on December 12, 1957, granted her authority, requested the previous day (R. 69), to conduct equipment tests of the nearly-completed station (R. 70). This authority was subsequently canceled on December 19, 1957, after the Commission became aware that her permit had expired (R. 59).

sion for completion. Accordingly, the Commission granted Mrs. Roberts' application for a construction permit to replace her expired permit (R. 26–29).[2] Simultaneously, it returned, without hearing, the petitioner's application for a construction permit for the same facilities (R. 67–68).

Petitioner then filed a petition for reconsideration of the Commission actions and again tendered its application for the identical facilities previously authorized to Mrs. Roberts (R. 37–54). In its petition for reconsideration, petitioner urged that under the terms of Section 319(b) of the Communications Act, there had been an automatic forfeiture of Mrs. Roberts' construction permit on the date of its expiration, and that therefore the Commission had before it two conflicting and mutually exclusive applications, upon which it was required, under *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, to hold a comparative hearing. The Commission denied reconsideration and reaffirmed its actions in a Memorandum Opinion and Order released on July 21, 1958 (R. 58–66). In this Memorandum Opinion, the Commission pointed out that the questions raised by petitioner as to Mrs. Roberts' qualifications were

[2] At the same time, the Commission, by letter, requested a statement from Mrs. Roberts concerning the matters raised in petitioner's letter of January 3, 1958, and stated that its grant of her application for replacement of expired permit was without prejudice to whatever action it might take as a result of this inquiry into her qualifications to be a licensee (R. 25). After study of Mrs. Roberts' reply (R. 31–36), the Commission determined that her application for license must be designated for hearing (R. 57–58); the hearing (FCC Docket No. 12597) is now in progress. See footnote 3, *infra*, p. 9.

to be considered in connection with its action on her pending application for a license (see footnote 2, *supra*).

On appeal, the Court of Appeals (Judge Miller dissenting, without opinion) affirmed the Commission's actions (Pet. App. B 1–8). The court upheld the Commission's determination that, under the provisions of Section 319(b) of the Act, the expiration of a permit does not constitute an automatic forfeiture of the permit; and that only if the Commission does not exercise its discretion, either by extension or replacement of the permit, does such a forfeiture occur (Pet. App. B. 6). The court stated (Pet. App. B 7): "One of the major purposes of the section is to allow the Commission to exercise its discretion before an automatic forfeiture takes place." It concluded (*ibid.*): "Under the circumstances of the present case, where the Commission's discretion has been exercised to prevent a forfeiture, there can be no basis for applying the *Ashbacker* doctrine." It also held that the Commission had not exceeded its powers, or abused its discretion, in postponing the questions raised as to the permittee's fitness until the holding of the hearing on her application for a license (Pet. App. B 7–8).

ARGUMENT

The questions raised by the petition present narrow issues of statutory interpretation which were decided correctly below and are of no general importance; they do not warrant further review by this Court.

1. The basic holding of the Court of Appeals is that where the causes for delay in construction are within

the control of the grantee, Section 319(b) of the Communications Act confers upon the Commission discretionary power in its consideration of requests for granting further time for construction. Thus, "automatic forfeiture", within the meaning of the Section, occurs only if the Commission does not exercise its discretion in extending the time for construction, by granting either an application for extension of the original permit or an application, filed within a reasonable period after expiration, for a new permit to replace the expired permit.

Petitioner's contention (Pet. 6) that the Court of Appeals' opinion would result in confusion in the administration of the Communications Act is without any merit. As the court found (Pet. App. B. 4–6), the Commission's uniform interpretation of the Section, followed in this case, is entirely consistent with the statutory scheme. If the Commission finds that delay in completion of construction is attributable to "causes not under the control of the grantee", it cannot declare the permit forfeited (Pet. App. B. 3–4). If, however, the causes for delay are under the control of the grantee, the Commission is still authorized to "allow further time" for construction as in its discretion seems reasonable under the circumstances, and nothing in the language of the Section purports to limit the Commission's exercise of this discretion to cases where the permittee applies for further time in advance of the permit's expiration date (Pet. App. B. 4, 6). The statute, in other words, provides an appropriately flexible mechanism for Commission evaluation of the varying factual circum-

stances which may or may not justify further extension of the station's completion date. We submit, therefore, that the court below correctly affirmed the "longstanding and consistent administrative interpretation" (*United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396) of the agency charged with administering the Act (see Pet. App. B 4–5, for citation of prior Commission decisions).

2. Petitioner's further contention (Pet. 7–8) that, even if the Commission possesses discretionary power to prevent the forfeiture of an expired permit, the decision below abrogates the petitioner's rights to a comparative hearing under *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, is clearly unsound. As the court below properly held, "Since no automatic forfeiture occurs unless and until the Commission has exercised its discretion, the *Ashbacker* doctrine has never been applied to a Section 319(b) application" (Pet. App. B 6). This is because the frequency is not "available," for new applications in the *Ashbacker* sense, during the pendency of a Commission determination relating to the permit, nor does the frequency become "available" until either the abandonment of the permit by the original permittee or a valid denial by the Commission, in its discretion, of an application for extension or replacement of the permit (Pet. App. B 6–7).

3. Petitioner's final contention (Pet. 8–9), that the court below erroneously sustained the Commission's action in granting a replacement application without first disposing of petitioner's charges bearing upon Mrs. Roberts' qualifications to be a broadcast licensee,

is equally without merit. As the court noted, unlike Section 319(b) which relates solely to extensions of time to complete construction, Section 319(c) (see pp. 2–3, *supra*), governing the subsequent grant of licenses to operate broadcast stations, expressly provides for consideration at that time of matters coming to the Commission's attention which might make the grant of a license contrary to the public interest. The court was thus clearly correct in holding (Pet. App. B 7–8) that the Commission had not exceeded its powers or abused its discretion in deferring consideration of these qualification questions to the proceeding on Mrs. Roberts' license application.[3]

[3] As petitioner points out (Pet. 4, n. 6), the Commission has in fact designated Mrs. Roberts' license application for hearing on these qualification questions, and an examiner has issued an Initial Decision looking toward the denial of license (*In re Application of Jane A. Roberts (KCFI) for Station License*, Docket No. 12597, FCC 59D-55, issued May 28, 1959). Such action, if subsequently affirmed by the Commission and the courts, would moot the present action.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
ROBERT A. BICKS,
Acting Assistant Attorney General.
RICHARD A. SOLOMON,
Attorney.

EDGAR W. HOLTZ,
Acting General Counsel,
MAX D. PAGLIN,
Assistant General Counsel,
RICHARD M. ZWOLINSKI,
Counsel,
Federal Communications Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 212

MASS COMMUNICATORS, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION and JANE A. ROBERTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR JANE A. ROBERTS, INTERVENOR BELOW, IN OPPOSITION

HARRY J. DALY
LENORE G. EHRIG
Attorneys for Jane A. Roberts
1026 Pennsylvania Building
Washington 4, D. C.

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v.

FEDERAL COMMUNICATIONS COMMISSION and JANE A. ROBERTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR JANE A. ROBERTS, INTERVENOR BELOW, IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. B. 1-8) is not yet reported. The decision of the Federal Communications Commission (R. 148-154) denying the Mass Communicators' petition for reconsideration is unofficially reported at 17 Pike and Fischer R.R. 572.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 16, 1959 (Pet. App. A.). The petition for a writ of certiorari was filed on July 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 47 U.S.C. 402 (j).

QUESTIONS PRESENTED

The Federal Communications Commission granted JANE A. ROBERTS' application for a construction permit to replace her permit to construct a new standard broadcast station, which was inadvertently allowed to expire at a time when construction was virtually completed. This grant was made even though a new application for the identical facilities had been filed by petitioner Mass Communicators ten days prior to the aforesaid reinstatement application and even though questions concerning the qualifications of the permittee to be a broadcast licensee had been raised. The questions presented as stipulated by the parties are as follows:[1]

1. Does the Commission have the power to grant an application for a construction permit to replace an expired construction permit when the Commission cannot find that completion of the authorized construction within the time prescribed was prevented by causes not under the control of the grantee?

2. Where a construction permit granted by the Commission expired in accordance with its terms, where a new applicant subsequently files an appli-

[1] The questions presented as contained in the petition are not verbatim as presented to the court below.

cation for a construction permit for the same facilities; and where the original permittee thereafter files an application for a construction permit to replace the expired construction permit, is the Commission required to hold a comparative hearing to determine which of the two applications should be granted?

3. Where the Commission has before it unresolved questions bearing upon the qualifications of the applicant, may the Commission grant an application for a construction permit to replace an expired construction permit and postpone consideration of the said questions until the applicant later files an application for a license to cover the construction permit?

In addition, Jane A. Roberts believed the following question to be presented:

4. Was the appellant's petition for reconsideration timely and properly filed pursuant to the requirements of Section 405 of the Communications Act of 1934, as amended?

The latter question was not reached by the Court below.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*), namely Sections 308, 309 and 319, are set forth in petitioner's Appendix C.

STATEMENT

Jane A. Roberts, granted a permit by the Federal Communications Commission to construct a new standard broadcast station on 1250 kilocycles in Cedar Falls, Iowa (R. 1), built the station in accordance with her permit but inadvertently missed the completion date because of the fact that she had changed her site. Upon application for such matters, the Commission in the past has often increased the time within which the construction of the station involved could be completed (R. 9-10). Jane A. Roberts' permit involved a complicated directional array designed to give required protection to other stations in the United States (R. 1). There was no question of her being dilatory. She overran her time merely as a result of her failure to note the completion date on her modified permit and in the belief that her application to change site had automatically extended such completion date. At the stated completion date, her buildings were fully constructed, her towers erected, her ground system installed, her transmitter in place, all equipment was on hand and she was ready to request permission to test her station before its formal opening (R. 9-10).

Petitioner Mass Communicators, noting the passage of the completion date, filed an application with the Federal Communications Commission for exactly the same frequency on which Jane A. Roberts had constructed her station, in the very same town, and proposing to cover the very same area (R. 107).

Upon being advised by the Commission that her permit had expired and of the need to file an application for reinstatement, JANE A. ROBERTS immediately

made such application (R. 9, R. 7.). The latter was then granted and petitioner's application for the identical facilities returned (R. 22, R. 155-156). Petitioner thereupon filed a petition for reconsideration, again tendering its application (R. 107-124). The Commission denied such petition (R. 148-154) and again returned petitioner's application (R. 157). At the same time, it set for hearing certain questions which petitioner had raised concerning JANE A. ROBERTS' qualifications to be a broadcast licensee (R. 147). There followed an appeal by Mass Communicators to the United States Court of Appeals for the District of Columbia Circuit. The latter court affirmed the Commission's actions (Pet. App. B. 1-8).

ARGUMENT

It is well-settled that jurisdiction to review the judgments and decrees of the circuit courts of appeals by certiorari is to be exercised sparingly and only in cases of gravity and general importance, or in order to secure uniformity of decision. *In re Lau Ow Bew*, 141 U.S. 583, 35 L. Ed. 868; *Ohio v. Swift & Co.*, 260 U.S. 146, 67 L. Ed. 176. The petition for certiorari here involved presents no question of general importance warranting review. Rather, it involves narrow issues of statutory interpretation which are of no general importance.

Petitioner contends (Pet. p. 6) that Section 319 of the Communications Act of 1934, as amended, provides that a construction permit which has been allowed to expire is automatically forfeited as of its expiration date and that the sole exception to this flat rule is where completion of construction has been prevented by causes beyond the control of the per-

mittee. This contention is simply in error. As the court below held (Pet. App. B. 3-4):

> "Section 319 (b) of the Communications Act provides:
>
> '(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.'
>
> "The permit is thus required to provide for automatic forfeiture 'if the station is not ready for operation within the time specified,' subject, however, to two important avenues by which forfeiture may be avoided. If the Commission finds that the construction of the station facilities had not been completed by the specified time because of 'causes not under the control of the grantee,' the Commission cannot declare an automatic forfeiture of the permit. . . . If, on the other hand, the causes for delay of construction are within the control of the grantee, the Commission is given the power to exercise its discretion and allow further time for construction. An automatic forfeiture of the permit then occurs only 'if the station is not ready for operation . . . within such further time as the Commission may allow: . . .'"

The Court further held that [Pet. App. B. 6]:

> "It is clear then that an expiration of a permit was by no means to be considered an automatic forfeiture of the permit. Only if the Commission did not exercise its discretion in extending the time within which the facilities were to be constructed, either by an actual extension . . . or by

a grant of a new permit to replace the expired permit . . . was there to be an automatic forfeiture."

This decision follows the cases which have previously been decided by the Commission itself on this point. See *Bremer Broadcasting Corp.*, 3 Pike & Fischer R.R. 1579; *Christian County Broadcasting Co.*, 6 Pike and Fischer R.R. 849; *WAAB, Inc.*, 13 Pike and Fischer R.R. 461.

By reinstating Jane A. Roberts' construction permit, the Commission merely exercised its discretion as provided by the statute and allowed her additional time within which to complete her construction. These facts being so, petitioner's contention that the decision of the court below raises a question of fundamental importance to the administration of the Communications Act and will result in confusion is lacking in merit, especially when viewed in light of the fact that the Commission in effect merely followed its own precedent as outlined in the *Christian County* and *Bremer* cases, *supra*, which it has adhered to for years.

Petitioner's contention that it is entitled to a comparative hearing under the *Ashbacker*[2] doctrine is similarly unsound. The *Ashbacker* case decided a matter between two mutually exclusive applicants, each of whom duly filed for a specific frequency and place, new applications each, no late comers after one station had been granted a permit and virtually completed construction. Here petitioner filed a new application for an original construction permit almost a year after the grant of the JANE A. ROBERTS' permit.

[2] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

at a time when JANE A. ROBERTS had all but finished building her station, having already expended money, effort and time on the project. The JANE A. ROBERTS' application for an extension of time to complete this construction and petitioner's application had no common grounds for comparison. This being so, the court below properly ruled there was no basis for applying the *Ashbacker* doctrine.

Petitioner also complains that the Commission proceeded without investigating certain matters which it had raised bearing on the applicant's qualifications. The Commission has held a hearing to determine whether or not JANE A. ROBERTS' husband had signed some of the applications and documents on her behalf and what effect this might have on JANE A. ROBERTS' qualifications. An Initial Decision has been rendered and the matter is before the full Commission for its review and final decision. The court below properly held that the Commission acted well within its discretionary powers in handling the above investigation as it has done. It is submitted that the question of basic qualifications under investigation has no relevancy to petitioner's position herein. No matter the result of such investigation, petitioner's application would still be entitled to no comparative consideration and was still properly returned.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

HARRY J. DALY
LENORE G. EHRIG
Counsel for JANE A. ROBERTS

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IN THE

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MASS COMMUNICATORS, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

SEYMOUR M. CHASE
Wyatt Building
Washington 5, D. C.
Attorney for Petitioner

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Without offering fact or argument to support it, respondent tenders to the Court its conclusion that this case presents issues which are "of no general importance" and do not warrant further review by the Court (Resp. Br. 6). Thus deprived of the benefit of any presentation to the contrary, the Court is left to rely entirely on the matters advanced by the petitioner to show the genuine importance of the questions presented (Pet. 5). It follows that the Court ought to grant the petition unless it can find that the reasons advanced by the petitioner are not persuasive.

Respondent's first argument (Resp. Br. 6) neatly demonstrates the central error of which this petitioner is

complaining. It is the plainly defective logic that the Commission can possess discretion to prevent a forfeiture which the statute declares to be automatic.[1] This defect of reason leads to the further fallacy that the Commission has been endowed with the power to prevent a forfeiture in every circumstance, notwithstanding the obvious intent of Congress that there should be at least some circumstance in which forfeiture of a construction permit should occur "automatically".[1] Thus does respondent prove the validity of another of the reasons advanced by the petitioner (Pet. 6) for a grant of the writ, viz., that the statute ought not to be left with the construction given it by the majority of the Court below because the reasonableness of that construction is patently questionable.

Respondent's second argument is merely an extension of the first, and the defect of reason in the first also debilitates the second. What is worse, however, is that the second argument would result in a holding that the Commission has properly carved a huge area of discretion out of the mandate imposed by this Court upon the Commission in the *Ashbacker* case.[2] Surely the Court ought not to allow this landmark decision to be so sharply narrowed without a careful review.

The final argument of the respondent is destroyed by the very terms of the statute upon which it purports to rest. Section 319(c) of the Communications Act (Pet. App. C) is a safety valve. Before the Commission grants any construction permit it determines that the applicant is qualified and that the grant would serve the public interest. Precisely the same determination is made anew

---

[1] Communications Act of 1934, as amended, Section 319(b) (Pet. App C).

[2] Ashbacker, Radio Corp. v. Federal Communications Commission, 326 U.S. 327.

whenever, as in this case, the Commission has before it an application for a new construction permit to replace a permit which has expired and has become forfeited. It was recognized, though, that some time after this threshold determination is made the Commission may receive word of facts or circumstances sufficient to put into question the qualifications previously established or the public interest previously ascertained. Therefore, by Section 319(c) the Commission was empowered to reopen its prior determinations when it has before it an application for a license to cover the construction permit. However, and here is the point, the statute expressly makes this safety valve operable only with respect to a "cause or circumstance first coming to the knowledge of the Commission since the granting of the permit".[3] In the instant case the serious questions raised concerning the qualifications of the permittee were brought to the attention of the Commission *before* it granted the new permit in place of the expired permit. The Commission made the grant nevertheless. This the Commission is precluded from doing by Sections 308, 309 and 319(a) of the Act,[4] and its error is not saved by the grant of authority contained in Section 319(c).

Conclusion

For the foregoing reasons, as well as those heretofore urged in the petition for a writ of certiorari herein, petitioner contends that said petition should be granted.

Respectfully submitted,

SEYMOUR M. CHASE
Wyatt Building
Washington 5, D. C.
Attorney for Petitioner

September, 1959

[3] Resp. Br. 2.

[4] Pet. App. C.